AUG 18 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1031

LEONARD TONASKET,
Appellant,

v.

THE STATE OF WASHINGTON and THE SUPERVISOR OF THE TAX COMMISSION OF THE STATE OF WASHINGTON,
Respondents.

On Appeal from the Supreme Court of Washington

BRIEF FOR AMICUS CURIAE, NATIONAL CONGRESS OF AMERICAN INDIANS IN SUPPORT OF APPELLANT

CHARLES A. HOBBS
Counsel for Amicus Curiae, National Congress of American Indians, Inc.
1616 H Street, N.W.
Washington, D.C. 20006

WILKINSON, CRAGUN AND BARKER
RICHARD A. BAENEN
of Counsel

WILSON - EPES PRINTING CO., INC. - RE 7-8002 - WASHINGTON, D. C. 20001

TABLE OF CONTENTS

	Page
STATEMENT OF INTEREST	1
SUMMARY OF ARGUMENT	2
ARGUMENT	2
I. The State of Washington Has No Public Law 280 Jurisdiction to Tax Indians on the Colville Reservation	2
A. Criminal Law Aspect of P.L. 280	3
B. The Civil Law Aspect of P.L. 280	4
II. The State of Washington Has No Public Law 280 Jurisdiction At All Over the Colville Reservation	8
CONCLUSION	10

TABLE OF CITATIONS

Cases:

Borough of Ramsey v. *Basil*, 19 N.J.Misc. 555, 21 A.2d 860 (1941)	4
Bowen v. *Dept. of Social Security*, 14 Wash.2d 148, 127 P.2d 682 (1942)	7
City of Burlington v. *Burlington Traction Co.*, 70 Vt. 491, 41 Atl. 514 (1898)	7
City of Chicago v. *Walcher*, 327 Ill.App. 556, 64 N.E.2d 394 (1946)	4
City of New Town v. *United States*, 454 F.2d 121 (1972)	4
City of Sioux Falls v. *Famestad*, 71 S.D. 98, 21 N.W.2d 693 (1946)	4
City of St. Louis v. *Stubley*, 154 S.W.2d 407 (Mo. App. 1941)	4
Clarke v. *City of Evansville*, 75 Ind.App. 500, 131 N.E. 82 (1921)	7
Epperson v. *Johnson*, 190 Okla. 1, 119 P.2d 818 (1941)	7
Fortune v. *Incorporated Town of Wilburton*, 5 Ind. Terr. 251, 82 S.W. 738 (1904)	4

TABLE OF CITATIONS—Continued

	Page
Halverstadt v. *Berger*, 72 Neb. 462, 100 N.W. 934 (1904)	7
Kennerly v. *District Court*, 400 U.S. 423 (1971)	3, 9
Los Alamos School v. *State*, 35 N.M. 122, 290 P. 1019 (1930)	7
Menominee Tribe v. *United States*, 391 U.S. 404 (1968)	7
Quinault Tribe v. *Gallagher*, 368 F.2d 648 (9th Cir. 1966), cert. den., 387 U.S. 907	7, 9
Seymour v. *Superintendent*, 368 U.S. 351 (1962)	4
Squire v. *Capoeman*, 351 U.S. 1 (1956)	7
United States v. *Celestine*, 215 U.S. 278 (1909)	4
Warren Trading Post Co. v. *Arizona Tax Comm'n*, 380 U.S. 685 (1965)	3
Miscellaneous:	
Dept. of the Interior, *Federal Indian Law* (GPO 1958)	3
Public Law 280, 67 Stat. 588, 18 U.S.C. § 1162, 28 U.S.C. § 1360	*passim*
S.Rept. 699, 83d Cong. (1953)	6
U.S. Code Cong. & Admin. News (1953)	6
Webster's New International Dictionary, 2nd Edition	6
7 Words and Phrases	6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1031

LEONARD TONASKET,

Appellant,

v.

THE STATE OF WASHINGTON and THE SUPERVISOR OF THE TAX COMMISSION OF THE STATE OF WASHINGTON,

Respondents.

On Appeal from the Supreme Court of Washington

BRIEF FOR AMICUS CURIAE, NATIONAL CONGRESS OF AMERICAN INDIANS IN SUPPORT OF APPELLANT

STATEMENT OF INTEREST

This brief is filed with the consent of both parties.

Amicus Curiae, the National Congress of American Indians (NCAI), is a nonprofit association of some 147 Indian tribes, including virtually all of the major organized tribes except the Navajo Tribe. Its purpose is to promote the interests of American Indians. It was in-

corporated in Oklahoma in 1954, and its national headquarters is at 1346 Connecticut Avenue, N.W., Washington, D.C.

NCAI supports the position of the Appellant Indian, Leonard Tonasket, and joins him in asserting that the decision of the Washington Supreme Court was erroneous. NCAI is deeply concerned with the Washington court's decision, because it represents one more example of a state attempting to extend its jurisdiction over a reservation Indian in a way that constitutes a usurpation of the tribe's governmental powers over its people.

SUMMARY OF ARGUMENT

1. Under Public Law 280, reasonably construed, the tribe did not lose any of its sovereign powers, except the power to legislate criminal and civil laws inconsistent with statewide criminal laws. The Act did not grant to the state the sovereign power to tax tribal members on the reservation. This conclusion follows from the ordinary meaning of the language used in the Act, and especially if a strict construction is followed.

2. The State of Washington has never repealed its Constitutional disclaimer of jurisdiction over Indians, and therefore Public Law 280 is not effective in Washington.

ARGUMENT

I. The State of Washington Has No Public Law 280 Jurisdiction to Tax Indians on the Colville Reservation

This case presents to the Court for the first time the fundamental question of whether Public Law 280, in granting to the state criminal and civil jurisdiction over the reservation and extending state criminal and civil laws to the reservation, granted to the state the power

to impose its taxes on Indian transactions within the reservation.

As important as the question of taxation is, the even more fundamental question, on which the Indian tribes of this country subject to Public Law 280 are anxiously awaiting the verdict, is *what powers of self-government did Public Law 280 leave to them?* Not much, apparently, if the ruling of the Washington Supreme Court is upheld.

A. *The Criminal Law Aspect of Public Law 280*

Before analyzing the civil law aspect of P.L. 280, it may be helpful to glance at the criminal law aspect, which is somewhat simpler in its ramifications. It is clear that Congress gave to the state courts criminal jurisdiction over offenses involving Indians, and made state criminal laws applicable to the reservation. By necessary implication, where Public Law 280 applies, Indians are also subject to the state law and order machinery—police, prosecutors, judges, jails, etc.

The big unresolved question is whether the state's jurisdiction is exclusive or concurrent. If concurrent, the tribe would retain the ability to legislate (consistent with state law) and operate its own enforcement machinery in areas that the state neglects to cover. If exclusive, then the tribe's powers of self-government have been much more severely curtailed, and law and order services much less likely to be provided in a satisfactory way.

Any grant of jurisdiction to the state in derogation of tribal self-government should be strictly construed, and only as much jurisdiction granted which plainly and necessarily is encompassed in the language of the Act.[1] Since P.L. 280 did not say that the state's juris-

[1] See *Warren Trading Post Co.* v. *Arizona Tax Comm.*, 380 U.S. 685, 687 (1965); *Kennerly* v. *District Court*, 400 U.S. 423 (1971); and Dept. of the Interior, *Federal Indian Law* (G.P.O. 1958), at

diction would be exclusive, and since exclusive jurisdiction is not necessary in order for the state to acquire and properly exercise what Congress gave it, the jurisdiction should be held concurrent. We should not forget that the tribe's sovereign powers existed long before the state's, and should not lightly be annulled.

It should also be noted that only state-wide criminal laws apply to the reservation.[2] Consequently, local county and municipal ordinances do not apply, and the tribe is free to enact its own local ordinances, consistent with state law.

B. *The Civil Law Aspect of Public Law 280*

The civil law aspect of P.L. 280 presents more or less the same complications, plus the serious question of what laws are included under the term "civil laws." The court below seemed to define "civil laws" as *all*

---

395 ("This right of self-government, which has been consistently protected by the courts . . ."), and 396-402. Once a reservation is established or recognized by Congress, subsequent diminutions of that reservation are strictly construed. *United States* v. *Celestine*, 215 U.S. 278 (1909); *Seymour* v. *Superintendent*, 368 U.S. 351 (1962); *City of New Town* v. *United States*, 454 F.2d 121 (8th Cir. 1972).

[2] Congress did not make *local* state laws applicable to the reservations. P.L. 280 says that criminal and civil laws shall have the same force on reservations as "elsewhere within the State". This implies that only state-wide laws apply to the reservations.

It is interesting to note that enforcement of quasi-criminal municipal ordinances in most states seems to be considered civil proceedings. See, e.g., *Fortune* v. *Incorporated Town of Wilburton*, 5 Ind. Terr. 251, 82 S.W. 738 (1904); *Borough of Ramsey* v. *Basil*, 19 N.J.Misc. 555, 21 A.2d 860 (1941); *City of St. Louis* v. *Stubley*, 154 S.W.2d 407 (Mo.App. 1941); *City of Chicago* v. *Walcher*, 327 Ill. App. 556, 64 N.E.2d 394 (1946); *City of Sioux Falls* v. *Famestad*, 71 S.D. 98, 21 N.W.2d 693 (1946).

non-criminal laws, including laws imposing taxes on citizens. It the court was right, then we can expect the state to assert over the reservation all of its other sovereign powers—for instance, the power to grant licenses and franchises (such as for liquor dispensaries, casinos, etc.), to engage in proprietary activities (power and irrigation projects, ferry operations, etc.), to regulate tribal enterprises, and so on. If the state now has these powers, the tribal powers of self-government are correspondingly diminished.

Is this what Congress intended?

P.L. 280 has two operative clauses relevant to the civil aspect. The first says—

> "[the state] shall have jurisdiction over *civil causes of action* between Indians or to which Indians are parties. . . ." (Emphasis added)

The second says:

> ". . . those civil laws of the State that are of general application to *private* persons or *private* property shall have the same force and effect within such Indian country as they have elsewhere within the State. . . ." (Emphasis added)

We believe a fair reading of these two clauses confirms that Congress never intended "civil laws" to mean the entire array of state non-criminal laws, but rather that Congress intended "civil laws" to mean those laws which have to do with private rights and status. Therefore, "civil laws . . . of general application to private persons or private property" would include the laws of contract, tort, marriage, divorce, insanity, descent, etc., but would not include laws declaring or implementing the state's sovereign powers, such as the power to tax, grant franchises, etc. These are not with the fair meaning of "private" laws.

Our reading is supported by the meagre legislative history available to the public.[3] The Senate Report[4] characterized the bill as relating to

> ". . . criminal offenses and *civil causes of action* committed or *arising on Indian reservations* within such States . . ." (Emphasis added)

This certainly does not reveal an intent that the state would acquire broad sovereign powers over Indians such as the taxing power.

The dictionary meaning of "civil" corroborates our reading of P.L. 280. Webster's New International Dictionary, Second Edition, defines "civil" as follows:[5]

> "8. *Law.* Relating to the private rights of individuals in a community and to legal proceedings in connection with them; pertaining to rights and remedies sought by action or suit distinct from criminal proceedings . . ."

There is nothing here to hint of the great sovereign powers which the state claims it received.

In a number of cases, courts have held that certain non-criminal proceedings involving exercise of sovereign

---

[3] There are no published hearings. We understand that an unedited transcript of hearing exists in the House Committee files at National Archives, but since 1953 the House has instructed Archives to permit review only of published material (and then only on special permission of the House Clerk), and so we were unable to review this transcript.

[4] S.Rept. 699, 83d Cong. (1953), reprinted U.S. Code Cong. & Admin. News (1953) at pp. 2409-2414.

[5] And hundreds of cases say practically the same thing. See cases collected at 7 *Words and Phrases*, pp. 332-378.

powers are not "civil" proceedings.[6] Of course those were special contexts and of little relevance here, yet they add further corroboration to the normal connotation of "civil" (especially as used in P.L. 280) as referring to private rights, as opposed to sovereign powers over citizens. Congress was not concerned that the states lacked these powers on the reservation, but with the absence of a functioning system for the resolution of private rights.

In conclusion, it seems clear that Congress had in mind a more normal definition of "civil laws" than the court below supposed, and if there is any doubt about it, the doubts should be resolved in favor of preserving the tribal powers of self-government.[7]

We leave the subject with the note that there are some tribes as to whom the state has asserted only partial jurisdiction in enumerated areas. One example is the Quinault Tribe of Washington, as to whom the state asserts exclusive jurisdiction on all subject matters occurring on fee land within the reservation, but on Indian trust land it asserts its jurisdiction only in a few enumerated areas.[8] This has created a checkerboard nightmare

---

[6] *Epperson* v. *Johnson*, 190 Okla. 1, 119 P.2d 818 (1941) (condemnation proceeding); *Los Alamos School* v. *State*, 35 N.M. 122, 290 Pac. 1019 (1930) (taxpayer's action for refund); *Halverstadt* v. *Berger*, 72 Neb. 462, 100 N.W. 934 (1904) (appeal from order of village board re liquor license); *Clarke* v. *City of Evansville*, 75 Ind. App. 500, 131 N.E. 82 (1921) (appeal from assessment for street improvement); *City of Burlington* v. *Burlington Traction Co.*, 70 Vt. 491, 41 Atl. 514 (1898) (proceeding before railroad commission); *Bowen* v. *Department of Social Security*, 14 Wash. 2d. 148, 127 P.2d 682 (1942) (appeal from decision of the Washington Department of Social Security).

[7] As this Court is well aware, statutory ambiguities are construed in favor of the Indians. *Menominee Tribe* v. *United States*, 391 U.S. 404 (1968); *Squire* v. *Capoeman*, 351 U.S. 1 (1956). And see note 1 above.

[8] Family, juvenile, insanity, welfare and traffic matters. The system was described in *Quinault Tribe* v. *Gallagher*, 368 F.2d 648 (9th Cir. 1966).

for the law enforcement authorities, because as far as criminal law is concerned, federal and tribal laws applies to trust land, and state law to fee land. Understandably, the state law enforcement officials have given up, and simply do not normally provide law and order services at all on the reservation.

Another example is the Flathead Tribe of Montana, which has a system modeled after the Washington statute, but with differences that make it practical.[9] Obviously in a case such as Flathead, the taxing power would not vest in the state, because not enumerated in the tribal acceptance of limited state jurisdiction.

II. The Statute of Washington Has No Public Law 280 Jurisdiction at All Over the Colville Reservation

The State of Washington has never validly accepted Public Law 280, and therefore cannot base its taxing power over Indians on that Act.

The Washington Constitution, Article 26, has provided ever since the state entered the Union in 1889, that—

> ". . . the people inhabiting this state do agree and declare that . . . all lands . . . owned or held by any Indian or Indian tribes . . . shall remain under the absolute jurisdiction and control of the congress of the United States. . ."

Some eight states have similar constitutional disclaimers, and Congress was aware of them when it en-

[9] The chief difference is that the Flathead arrangement is consensual, while the Quinault arrangement is imposed over the Indians' objections. The Flathead Tribe has accepted state jurisdiction over the same subject matters as enumerated in the preceding note, plus the criminal area. However, at Flathead this partial jurisdiction applies to all land, regardless whether in fee or trust, and the Flathead Tribe made it clear that it was retaining concurrent jurisdiction. At Quinault, the state insists that its jurisdiction is exclusive, so that the Tribe is supposedly not allowed to cover areas neglected by the State.

ed Public Law 280. Section 6 of P.L. 280 gives the sent of the U.S. to these states to amend their con- utions to remove the disclaimers. Section 6 concludes, vever,

> "That the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their state constitution or statutes as the case may be."

Vashington has not even tried to amend its Constitu-, so it would certainly seem that Public Law 280 not become effective in that state.

But in 1966 the Ninth Circuit held [10] that the above ted Section 6 of P.L. 280 did not mean what it said; that Washington could assert jurisdiction over In- lands whether it amended its constitution or not.[11] tiorari was sought from this Court, and the Indian e, the state, and the United States all agreed that Court should review the Ninth Circuit's decision. vertheless, certiorari was denied.[12]

The issue remains alive, and subject to being raised in ry relevant case arising in Washington until this rt disposes of it. Not having been raised below or fed here, we appreciate that the Court will not wish decide this issue now. Nevertheless, there is a latent

---

Quinault Tribe v. *Gallagher*, 368 F.2d 648 (9th Cir. 1966). The t first dismissed the case for lack of $10,000 being involved, 368 at 651-5, but shortly after, Congress removed this requirement Indian tribes, and the court accepted jurisdiction on rehearing. en denied relief on the merits. 368 F.2d 655-8.

This was certainly not the attitude of this Court in *Kennerly istrict Court*, 400 U.S. 423, 427 (1971), where P.L. 280's re- ement of affirmative legislative action was held no "idle choice ords."

387 U.S. 907.

fundamental defect in the state's case, which has strong color of argument on its face, and we thought the Court should be aware of it.

CONCLUSION

This Court should reverse the decision of the Washington Supreme Court, and declare that the State of Washington has no power to tax Indians on the Colville Reservation.

Respectfully submitted,

CHARLES A. HOBBS
Counsel for Amicus Curiae,
National Congress of American Indians, Inc.
1616 H Street, N.W.
Washington, D.C. 20006

WILKINSON, CRAGUN AND BARKER
RICHARD A. PAENEN
of Counsel

August 18, 1972